

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SHARON J. LEE and U.S. POSTAL SERVICE,
POST OFFICE, Washington, DC

*Docket No. 03-405; Submitted on the Record;
Issued July 18, 2003*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's case for merit review under 5 U.S.C. § 8128(a) on the grounds that her application for review was not timely filed and failed to present clear evidence of error.

On January 11, 1977 appellant, then a 29-year-old letter carrier, filed a notice of traumatic injury and claim for continuation of pay/compensation, alleging that, on January 5, 1977, she slipped on snow and broke the seventh rib in her left side. Appellant's claim was accepted for partial fracture to the seventh rib, as well as trauma to soft tissues of the upper back. Appellant's pay was continued from January 8 through February 6, 1977 and from February 9 through 23, 1977. She was also paid compensation for lost wages for the period March 30 through May 26, 1977. Appellant resigned her position on June 30, 1977.

By letter dated November 5, 1981, appellant requested that her claim be reopened. By decision dated February 24, 1983, the Office determined that the medical evidence did not establish that appellant's physical condition on November 5, 1981 was related to her injury of January 5, 1977. Appellant's October 13, 1983 letter to her congressman was considered as a request for reconsideration of the February 24, 1983 decision. By decision dated August 31, 1984, the Office found that the evidence was insufficient to warrant modification. Appellant again requested reconsideration on July 15, 1986. By decision dated October 8, 1986, the Office vacated the February 24, 1983 decision and proceeded to further develop the case. By letter dated April 4, 1988, appellant was referred to Dr. Frederick J. Lieb, a Board-certified orthopedic surgeon, for an impartial medical examination to resolve a conflict in the medical evidence. After reviewing appellant's history and conducting a physical examination, Dr. Lieb diagnosed: (1) fracture, closed, united, left seventh rib, without residual; and (2) no objective evidence of impairment or pathology involving musculoskeletal system or spinal axis or current evaluation. Dr. Lieb noted that appellant did not continue to suffer from residuals of the January 5, 1977 injury. By decision dated August 3, 1990, the Office found that, based on the weight of the

medical evidence, appellant's claim was denied as she has no residual conditions related to her January 5, 1977 work injury.

By letter dated August 12, 2002, appellant requested reconsideration. In support thereof, appellant submitted a March 6, 2001 report by Dr. Jalil Rashti, an orthopedic surgeon, wherein she indicated that appellant had complaints of pain in her upper back, neck and shoulders with numbness of the hands and pain in the lower extremities. She indicated that appellant had a job-related injury in 1977 and a motor vehicle accident in April 2000. He listed findings that appellant had limited range of motion of the cervical spine, diminished sensation in both hands, a positive Tinel's sign in both hands, and tenderness in the cervicothoracic lumbar region with CT evidence of C5-6 and C6-7 disc protrusion.

Appellant also submitted an August 14, 1997 report by Dr. John C. Chiu, a Board-certified neurosurgeon, who listed his diagnostic impressions as: (1) post-traumatic cervical disc herniation with cervical radiculopathy; and (2) post-traumatic disc disease. He indicated that there was no question that appellant suffered these injuries as a direct result of her industrial injury. He noted that, in spite of conservative treatment, appellant's spinal symptom has become chronic and will require periodic medical follow-up and treatment, especially during exacerbation of symptoms in the future. Dr. Chiu indicated that surgeries of microdecompressive endoscopic cervical and thoracic discectomy with Holmium laser thermodyscoplasty were indicated for relief of her post-traumatic cervical and thoracic disc herniation.

Appellant also submitted reports by Dr. Moustapha Abou-Samra, a Board-certified neurosurgeon. In his July 21, 2000 report, Dr. Abou-Samra indicated that appellant had two separate problems. The first was an acute cervical disc herniation at the C4-5 level which most likely resulted from a recent car accident and the second is degenerative disc disease at the C5-6 and C6-7 levels suffered during "an industrial injury several years ago." He noted that this resulted in recurring cervical radiculopathy. In his May 30, 2002 report, Dr. Abou-Samra indicated that it is clear that appellant has degenerative disc abnormalities at the C5-6 and C6-7 levels, and that such abnormalities could have resulted from injuries suffered as consequences of the fall.

In a January 12, 2001 report, appellant's physical therapist indicated that he believed that appellant still had pain and disability secondary to her thoracic injuries sustained from her work injury in 1977.

By decision dated September 4, 2002, the Office denied appellant's application for reconsideration for the reason that it was untimely filed and did not show clear evidence of error.

The Board finds that the Office did not abuse its discretion in refusing to reopen appellant's case for merit review under 5 U.S.C. § 8128(a) on the grounds that appellant's August 12, 2002 request for reconsideration was untimely filed and failed to present clear evidence of error.

Section 8128(a) of the Federal Employees' Compensation Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation.

“The Secretary of Labor may review an award for or against compensation at any time or on his own motion or on application. The Secretary, in accordance with the facts found on review may--

(1) end, decrease or increase the compensation awarded; or

(2) award compensation previously refused or discontinued.”

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). One such limitation, 20 C.F.R. § 10.607(a), provides that the Office will not review a decision unless the application for review is filed within one year of the date of that decision. In the instant case, the last decision on the merits was issued on August 3, 1990, whereas appellant's petition for reconsideration was filed on August 12, 2002, over 12 years after the last decision on the merits. Accordingly, appellant's petition for reconsideration was not timely filed. However, the Office will reopen a claimant's case for merit review notwithstanding the one year filing limitation if the claimant's application for review shows clear evidence of error.¹ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.² This determination of clear error entails a limited review by the Office of the evidence submitted with the reconsideration request and whether the new evidence demonstrated clear error on the part of the Office.³ The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of the Office such that the Office abused its discretion in denying a merit review in the face of such evidence.⁴

In the instant case, appellant submitted in support of her request for reconsideration medical evidence that had not previously been reviewed. However, none of this evidence is sufficient to establish clear evidence of error. The Office had based its denial of benefits largely on the report of the impartial medical examiner, Dr. Lieb, who opined that appellant had no residual conditions related to her January 5, 1977 injury. Although Dr. Rashti mentions the work-related 1977 injury, he does not tie it to appellant's current condition. Dr. Abou-Samra states that appellant's degenerative disc abnormalities at the C5-6 and C6-7 levels “could have resulted from the injuries suffered as consequences of the fall. This speculative opinion simply refers to appellant's injury as an “industrial fall” and does not provide a reasoned medical opinion as to how this fall caused her current condition. Appellant's physical therapist's opinion that her current pain was causally related to the 1977 injury is entitled to no weight, as physical therapists are not considered physicians under the Act.⁵ The only remaining opinion to be

¹ 20 C.F.R. § 10.607(b); *Fidel E. Perez*, 48 ECAB 663, 665 (1997).

² *Id.*

³ *Id.*

⁴ *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

⁵ *See Jane A. White*, 34 ECAB 515 (1983).

considered is the opinion of Dr. Chiu, who clearly indicated that appellant's current medical condition is a direct result of the 1977 fall. However, Dr. Chiu's opinion is not sufficient to establish clear evidence of error. The term "clear evidence of error" is intended to represent a difficult standard. The claimant must present evidence which on its face shows that the Office made a mistake (for example proof that a schedule award was miscalculated). Evidence such as a detailed well-rationalized medical report, which if submitted before the denial was issued, would have created a conflict in medical opinion requiring further development is not clear evidence of error and would not require a review of the case.

The decision of the Office of Workers' Compensation Programs dated September 4, 2002 is hereby affirmed.

Dated, Washington, DC
July 18, 2003

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member